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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

v.

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMERICAN EXPORT LINES, INC.; AMERICAN TRADING TRANSPORTATION CO., INC.; CENTRAL GULF STEAMSHIP CORPORATION; CROWLEY MARITIME CORP.; DELTA STEAMSHIP LINES, INC.; GULF OIL CORPORATION; THE HANNA MINING CO.; HUDSON WATERWAYS CORP.; INTERNATIONAL OCEAN TRANSPORT CORP.; INTERSTATE OIL TRANSPORT CO.; LAKE CARRIERS' ASSOCIATION; LYKES BROS. STEAMSHIP CO., INC.; MARINE TRANSPORT LINES, INC.; MARITIME OVERSEAS CORPORATION; MOORE-MCCORMACK LINES, INC.; MOUNT SHIPPING, INC.; NATIONAL TRANSPORT CORP.; OGDEN MARINE, INC.; PUERTO RICO MARINE MANAGEMENT, INC.; SEA-LAND SERVICE, INC.; VANCOR STEAMSHIP CORP.; and WATERMAN STEAMSHIP CORP. AS AMICI CURIAE IN SUPPORT OF RESPONDENT, COMPAGNIE GENERALE TRANSATLANTIQUE

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae consist of twenty-two individual American steamship companies whose operations are nationwide. Their brief in support of Respondent, Compagnie Generale Transatlantique, is filed with the consent of counsel for the Petitioner and counsel for the Respondent dated, respectively, September 8 and September 11, 1978, and filed herein, a copy of which was appended to *amici curiae's* Brief in Support of the Petition for Writ of Certiorari.

Amici curiae are representative of American and foreign steamship companies which do business in the United States and are exposed to personal injury claims by waterfront workmen brought pursuant to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1976), *amending* 33 U.S.C. §§ 901 *et seq.* (1970).

The vessel owners which comprise *amici curiae*, as well as all vessel owners similarly situated, are vitally interested in an interpretation of the amended Longshoremen's Act that will require the financial burdens of an injury-producing waterfront accident to be apportioned equitably between the parties responsible for it. Such an interpretation will harmonize this Court's current views on loss distribution in maritime cases with the broad purposes of the 1972 Amendments to provide harbor workers with ample benefits and long-term security.

QUESTION PRESENTED

Where the jury found the shipowner 20% responsible, the stevedore 70% responsible, and the injured longshoreman 10% responsible for causing a waterfront accident, was the court below correct in apportioning the financial burden by limiting the shipowner's liability to its percentage of fault?

SUMMARY OF ARGUMENT

The 1972 amendments to the Longshoremen's Act have finally made it possible for courts to distribute the financial burdens of a waterfront personal injury in proportion to the fault of the parties who caused it. Proportionate distribution in the circumstances of this case will represent the last step necessary to put into effect this Court's views on the maritime rule of comparative negligence in cases involving personal injury, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and collision, *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), when waterfront accidents are caused by the concurring negligence of two or more parties.

Under the 1972 amendments, a stevedore is no longer required to indemnify a concurrently negligent shipowner. The stevedore's financial exposure is expressly limited to the payment of workmen's compensation benefits. However, its statutory immunity both from suits by injured employees and indemnity actions by third parties does not excuse it from all financial responsibility for a waterfront accident for which it has been found at fault to some degree. That was the situation here. The employer was found 70% at fault, the vessel owner 20% and the injured longshoreman 10%. That being so, the amended Longshoremen's Act requires apportionment of the financial burdens of the accident by the three responsible parties.

The application of what has come to be known as an "Equitable Credit" is the best way to implement this Court's stated view that damages should be divided in proportion to fault "whenever possible."[1] It requires the vessel owner to pay damages in exact proportion to its percentage of fault. It requires no more from the

[1] *United States v. Reliable Transfer Co.*, 421 U.S. at 411. The full quotation appears at p. 45, *infra*.

statutorily protected stevedore than its maximum exposure in compensation benefits, and less if its fault is slight. The injured worker has always been required to bear the consequences of his own contributory negligence and that is unchanged by the 1972 amendments. The worker can only benefit financially from vessel fault because he can never receive less than he is entitled to receive in statutory compensation benefits.

Congress intended for the courts to decide what should be done when an accident, such as this one, was caused by concurrent fault of the vessel owner and the employer although the statute does not specifically address itself to the point. The legislative history makes it quite clear that the vessel owner is not required to pay damages for the faults of the stevedore any more than it is required to pay damages to an injured longshoreman for his contributory negligence. Thus, this is not the sort of case that should be referred back to Congress for legislative action but is one which should be decided by this Court which traditionally takes the lead in the law maritime as it did in *Reliable Transfer.*

The doctrine of joint and several liability has nothing whatever to do with this litigation despite the contention that it was ignored, in fact abrogated, by the court below. Joint and several liability contemplates two defendants, each of whom is a tortfeasor answerable to the plaintiff in damages. The employer here cannot be considered a joint or any other kind of tortfeasor because its tort liability was removed by statute. It is meaningless to say that with the employer's tort liability removed by statute, the shipowner is thereby rendered "severally" liable. There is no other party with whom it can be severally liable.

Neither an apportionment of fault nor the application of an Equitable Credit will promote tripartite litigation because the stevedore's interests are always protected

by counsel for a personal injury plaintiff. The plaintiff's entire case depends upon his proving that the responsibility for his accident was that of the vessel owner rather than the employer in order to establish initial liability and to prevent possible reduction of his recovery through the application of a credit. The plaintiff's witnesses will be employees of the stevedore, whether or not the stevedore is actually involved in the litigation. Dual representation is entirely unnecessary.

Apportionment of fault works no financial burden on the stevedore or its carrier because the costs of insurance are passed directly to the vessel owner in the stevedoring rates. The inequity of a reverse-*Ryan*[2] indemnity sought by *amicus* Liberty Mutual Insurance Company, the compensation carrier for the stevedore which was 70% at fault, is quite apparent. The amended Act was not designed to provide windfall recoveries to negligent stevedores.

Full lien recovery by a substantially negligent stevedore defeats the incentive for promoting safety measures stressed in the legislative history. It is also true that if an employer, or its carrier, senses that some fault, be it ever so slight, can be shown on the part of a third party, the stevedore will be unwilling to participate in settlement negotiations which may diminish its lien recovery. Increased litigation will result, because a slightly negligent vessel owner will be forced to go to trial in the hope of avoiding liability altogether. Application of an Equitable Credit will apportion the financial burdens fairly, promote safety, and encourage settlements.

[2] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

ARGUMENT

I.

INTRODUCTION

The court below held that the Respondent shipowner was liable only for its share of the damages suffered by Petitioner in a waterfront accident caused concurrently by the 70% fault of his employer, the 20% fault of the shipowner, and petitioner's own 10% contributory fault. For a variety of reasons, Petitioner and *amicus* Association of Trial Lawyers of America argue that the 20% negligent Respondent pay Petitioner 90% of his damages,[3] while *amici* National Association of Stevedores and Liberty Mutual Insurance Company assert that the 70% negligent employer, or its compensation carrier, be fully indemnified and made completely whole from Petitioner's third-party recovery. Urging that with "new and effective defenses" the inequity of the pre- and post-*Sieracki*[4] days no longer exists for the vessel owner, the stevedore and compensation carrier now ask this Court that they be accorded a reverse-*Ryan*[5] indemnity whereby *any* fault, be it ever so slight, on the part of the vessel owner result in full indemnity, in the form of reimbursement of compensation benefits, to the concurrently negligent stevedore or its carrier. However, just as *amicus* Liberty Mutual argues that Congress could not have intended to limit lien recoveries by employers while burdening them with the increased cost of compensation benefits,[6] it is unthinkable that Congress intended, by the 1972 amendments to the Longshoremen's Act, to move backwards from a

[3] Reduced only by the finding below that Edmonds was 10% contributorily negligent.

[4] *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

[5] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 133-34 (1956).

[6] Brief of Liberty Mutual Ins. Co. at 29 *et seq.*

rule inequitable to stevedores to an earlier, discarded rule, similarly inequitable to shipowners.[7]

Prior to November 26, 1972, the effective date of the 1972 amendments, shipowners warranted the seaworthiness of their vessels to longshoremen performing work on board.[8] Whenever a longshoreman was injured due to unsafe conditions aboard the vessel, the shipowner was held absolutely liable for all proven damages, reduced only by the plaintiff's own contributory negligence.[9] This liability existed even though the unsafe condition was unknown to the vessel's crew and was brought about solely by a stevedoring company hired to load or unload the vessel. Shipowners resisted the inequity of such a result, and this Court subsequently held that shipowners were entitled to indemnification from the stevedore employing the injured longshoreman if the stevedore had breached its so-called "warranty of workmanlike service."[10] Indemnity was permitted even when the shipowner was concurrently at fault, unless such negligence had prevented the stevedore from performing its duties in a workmanlike manner.[11] Despite the exclusivity provision of the

[7] The Fourth Circuit, sitting below *en banc,* agreed:

> [I]t is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so.

577 F.2d 1153, 1155, Petitioner's Appendix at A56-57.

[8] *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 94-98 (1946).

[9] *Id. See Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953), especially the concurring opinion of Mr. Justice Frankfurter, 346 U.S. at 415.

[10] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 133-34 (1956). Under this theory, the stevedore was required to reimburse the shipowner for all damages recovered by the longshoreman, together with the shipowner's costs of defense.

[11] *See Weyerhaeuser Steamship Co. v. Nacirema Operating Co.,* 355 U.S. 563 (1958).

Longshoremen's Act,[12] stevedores were thus subjected to liability far in excess of their compensation obligations, and negligent shipowners avoided any financial responsibility aside from indirect payment through increased stevedoring charges. The inequity had passed from shipowner to stevedore and was a significant factor leading to the 1972 amendments.

Congress, by the passage of the 1972 amendments to the Longshoremen's Act, has now set the stage for judicial apportionment of responsibility in the form of a credit when a third party (Respondent shipowner here) and the employer (*amicus* Liberty Mutual's insured) are found concurrently at fault for an injury-producing accident. Such a credit has two basic aspects:

1. limitation of the shipowner's liability to its percentage of fault and
2. disposition of the employer's compensation lien.

The Fourth Circuit below adopted the first principle, but declined to rule on the second because the stevedore was absent. Both opinions of the Fourth Circuit below, however, recognized the importance of lien considerations to any overall resolution of this litigation.[13] *Amicus* Liberty Mutual Insurance Company's basic position is that even though its insured was found 70%

[12] 33 U.S.C. § 905 (1970), now 33 U.S.C. § 905(a) (1976).

[13] In the original majority panel decision below, 558 F.2d 186 (4th Cir. 1977), Judge Widener said:

> While the stevedore is not a party to this case, its lien looms large in any decision we may make here.

558 F.2d at 192, Petitioner's Appendix at A39. In the *en banc* decision, 577 F.2d 1153 (4th Cir. 1978) Chief Judge Haynsworth stated:

> The answer to the question [disposition of the lien] will affect the stevedore involved here and other stevedores very substantially, and its rights should not be adjudicated without its presence.

Id. at 1156, Petitioner's Appendix at A60-61.

at fault by a district court jury, it is nevertheless entitled to be indemnified 100% for compensation benefits paid Petitioner at the expense of the 20% negligent shipowner. Although invited to do so, it did not participate in this litigation at either the trial or appellate level[14] and even though lien disposition was considered at every level of the proceedings in this litigation,[15] the *en banc* decision below left lien disposition undecided because the employer was not represented.

Both Petitioner and *amicus* Liberty Mutual take the position that lien disposition is not before the Court,[16] a radical departure from Liberty Mutual's position in its brief in Support of Petition for Writ of Certiorari, at p. 4:

> Any decision which, like that of the Court of Appeals below, limits the recovery by an insurance carrier from a third party of its "workmen's compensation lien" is of direct and important interest to *amicus*.[17]

The Fourth Circuit's reason for deferring a decision on lienor's rights no longer exists. The stevedore,

[14] See letter exchanges between counsel for the vessel owner and Liberty Mutual Insurance Co., reproduced in Appendix, *infra*, at pp. 8a-13a.

[15] The assertion in Petitioner's and *amicus* Liberty Mutual's Answer to Motion for Additional Time for Argument on lienor's rights, that the subject was first raised at this level of the proceedings, is not correct.

[16] Answer to Motion for Additional Time for Argument; *amicus* Liberty Mutual's brief, 1, 2.

[17] It is rather interesting to note Liberty Mutual's position expressed in its brief on the merits at page 7: "Petitioner should have judgment for $90,000, and the District Court can then decide in the interpleader case what lien rights this *amicus* has." In its own mind, however, Liberty Mutual has already resolved the dispute. At page 7 of its brief in support of the petition for writ of certiorari Liberty Mutual has stated that "if Petitioner prevails in this Court *amicus* should recover $46,943.39 plus the amount of future benefits paid, whereas if Respondent prevails *amicus* would recover only $20,000. . . ."

through its insurance carrier which has paid compensation benefits, is before the Court and has fully briefed its position. This Court now has the opportunity to promote its policy of equitable distribution of loss in maritime accidents by affirming the decision below, with clear guidelines to the district court now considering distribution of the $20,000 judgment, that the application of an Equitable Credit should govern its decision.

II.

FAIR APPORTIONMENT OF FINANCIAL RESPONSIBILITY AMONG SHIPOWNERS, STEVEDORES AND INJURED LONGSHOREMEN IS BEST ACCOMPLISHED BY APPLICATION OF AN "EQUITABLE CREDIT."

In *Frasca v. Prudential-Grace Lines,* 1975 A.M.C. 1130, 1143 (D. Md., 1975),[18] a post-1972 amendment longshoreman's personal injury case, the jury found the shipowner, stevedore and injured longshoreman all at fault. The district judge applied what he termed an "Equitable Credit," *id.* at 1144, by which the shipowner's liability was limited to its relative percentage of fault in causing the injuries and the stevedore was not permitted to recover the compensation benefits it had paid. The credit was based on the following propositions:

> [1] An employee injured in the course of his employment recovers workmen's compensation benefits from his employer, regardless of fault. If the injury was not contributed to by the negligence of any third party, he recovers nothing more than these compensation benefits.
>
> [2] If the injury was caused by the fault of a third party, the employee may sue such third party

[18] The district court's initial opinion, reported in 1975 A.M.C. at 1143, concerns only the application of an Equitable Credit and is not reported elsewhere. The court's second opinion, granting the shipowner's motion for judgment n.o.v., is reported at 394 F. Supp. 1092, 1975 A.M.C. 1130.

for common law damages. His recovery is to be reduced to the extent of his own contributory negligence. And, if the employer was not also at fault, the full amount of all compensation benefits is to be deducted from the employee's recovery and paid to the employer in reimbursement.

[3] If the employer was a joint tortfeasor, it could be impleaded or otherwise bound by the third party. However, in such a case, the actual dollar liability of the employer should not exceed the amount of the employer's dollar liability in compensation. Just as every employee will be guaranteed *minimum* benefits of workmen's compensation, so will every employer be guaranteed a *maximum* liability of compensation benefits, whether directly or indirectly, for any employee's industrial accident.

The proportional amount of any employer's fault is to go in mitigation of the third party's damages, in the same fashion as the employee's contributory negligence, so that the third party actually responds to the employee only for that amount of the employee's damages as is equal to the third party's proportion of the fault.

[4] From any recovery the employee obtains from the third party, the employee is to reimburse the employer for the compensation benefits paid. However, if any employer negligence resulted in a diminution or reduction of the employee's recovery against the third party, the employee may deduct and retain that amount from the compensation benefits to be reimbursed.

Thus, if the damages attributable to the employer's fault were less than the amount of the compensation benefits, the employer would recover only the difference between the amount of the compensation benefits and the amount by which its fault reduced the employee's recovery. If the employer's fault were in excess of the compensation benefits, it would not receive any reimbursement, but neither would it be liable for any excess. In such situation the loss to the employee is the consideration for the absolute right to compensation benefits regardless of fault.

Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity for Equitable Uniformity in Tripartite Industrial Accident Litigation,* 19 N.Y.L.F. 587, 606-07 (1974).[19]

Where a longshoreman's injury is not in any way caused by the negligence of a vessel, his sole recourse is workmen's compensation payments under the Longshoremen's Act. Conversely, when a shipowner is solely at fault, it will be liable for the entire amount of the longshoreman's damages from which the stevedore will recover all monies paid in compensation benefits.

It is in the area of mutual fault by the shipowner and stevedoring-employer, with or without fault on the part of the injured worker, that the Equitable Credit comes into play. The heart of the Equitable Credit is the proposition that a negligent third party can only be held liable for that portion of total proven damages which equals his proportionate fault.[20] Application of an Equitable Credit can hardly be considered unfair to any of the parties affected. The injured longshoreman can only benefit financially when vessel fault is proven because under no circumstances may he receive less than his entitlement in workmen's compensation benefits. The vessel owner must pay damages measured by its percentage of fault. The stevedore's maximum exposure is statutory compensation payments and may be less if its fault is slight. The palpable injustice of requiring the vessel owner to pay full damages when the employer is largely at fault is avoided.[21]

[19] The authors are both admiralty practitioners, one of whom represents shipowners and the other stevedoring employers.

[20] The mathematical mechanics of the Equitable Credit are demonstrated by examples set out in the Appendix hereto, at pp. 1a-7a.

[21] Equitable Credit is not the only formula by which responsibility for damages suffered by an injured longshoreman may be apportioned between concurrently negligent shipowners and stevedores. Distinguished admiralty lawyers from other jurisdictions, primarily John R. Brooke, Esquire, of Messrs. Wood, Wood, Tatum, Mosser & Brooke, Portland, Oregon; Graydon S. Staring, Esquire, of Messrs. Lillick, McHose & Charles, San Francisco, California; and E. D. Vickery, Esquire, of Messrs. Royston, Rayzor, Vickery & Williams, Houston, Texas, have urged a somewhat different formula termed the "Etna Subrogation Approach," so named because it stems from an application of the principle enunciated by the Court of Appeals for the Third Circuit in *The Etna,* 138 F.2d 37 (3d Cir. 1943). This is the method espoused by *amicus* Pacific Merchant Shipping Association in its brief at text for fn. 98. Other methods may be possible. However, only the propriety of a credit is now before this court — not its mechanics. That subject could properly be left for future analysis in the district courts.

III.

THE GENERAL MARITIME LAW FAVORS APPORTIONMENT OF FAULT.

The general maritime law has long been a leader in the promulgation of equitable rules apportioning liability for losses caused by the concurrent fault of two or more parties. The doctrine of comparative fault was entrenched in admiralty before it became the law of any state.[22] Its application was broadened in two recent Supreme Court cases articulating the policies in maritime law underlying the apportionment of liability according to fault. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974), extended the rule permitting contribution among joint tortfeasors to non-collision cases. *United States v. Reliable Transfer Co.,*

[22] *See, The Max Morris,* 137 U.S. 1 (1890). Prior to 1931 when the Wisconsin legislature passed a comparative fault law, only Mississippi (1910) and Georgia (1913) had adopted rules of comparative fault, and those came into existence in order to deal with specific problems. The rapid increase in the number of comparative law jurisdictions has been in large part a development of the last decade. *See generally,* V. Schwartz, *Comparative Negligence* 1-3, 11-17 (1974). In contrast, The Jones Act, 46 U.S.C. § 688 and the Death on the High Seas Act, 46 U.S.C. § 761, both enacted in 1920, provide for comparative negligence.

421 U.S. 397 (1975), then replaced the rule in collision cases of dividing damages equally, whenever both vessels were at fault, with one allocating liability in direct proportion to the fault of each vessel. The rationale for both decisions was a policy decision that whenever possible parties should pay for the consequences of their wrongs.[23]

Petitioner and his supporting *amici curiae* attack all reference to *Reliable Transfer* on the theory that it was decided after the 1972 amendments, and thus could not have been within the contemplation of Congress when the amendments were enacted. This totally ignores the basic nature of legislation. General principles of maritime law have evolved over the centuries and are constantly brought up to date by the judiciary. Against this background, Congress legislates in piecemeal fashion where a specific need is recognized. The general maritime law is displaced only to the extent necessary to give effect to precise statutory provisions. Where Congress is silent, the general maritime law applies. Thus, in filling in gaps left by the 1972 amendments, the Court must apply the general maritime law *as it*

[23] *See* Coleman and Daly, *Equitable Credit: Apportionment of Damages According to Fault in Tripartite Litigation Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 35 Md. L. Rev. 351, 362-65 (1976). The principle enunciated in *Reliable Transfer* has since been applied to a variety of non-collision disputes. *See Hanover Ins. Co. v. Puerto Rico Lighterage Co.*, 553 F.2d 728, 730 (1st Cir. 1977) (negligent towage); *Dow Chemical Co. v. M/V Gulf Seas*, 428 F. Supp. 667, 673 (W.D. La. 1977) (negligent towage); *Afran Transport Co. v. S/T Maria Venezelos*, 450 F. Supp. 621, 636 (E. D. Pa. 1978) (grounding); *Creole Shipping, Ltd. v. Diamandis Pateras, Ltd.*, 410 F. Supp. 313 (S.D. Ala. 1976) (negligent mooring); *Master Shipping Agency, Inc. v. M/S Farida*, 571 F.2d 131, 133 (2d Cir. 1978) (negligent stowage); *Pan-Alaska Fisheries v. Marine Const. & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977) (fire); *Vana Trading Co. v. SS Mette Skov*, 415 F. Supp. 884, 888 (S.D.N.Y. 1976) (cargo claim).

now exists.[24] While this is particularly true in admiralty,[25] federal courts construing other federal statutes have frequently looked to cases decided after passage of the legislation in question to obtain guidance in their statutory construction.[26]

IV.

ATTACKS MADE BY PETITIONER AND HIS SUPPORTING *AMICI* ON THE OPINION BELOW ARE UNSOUND

A. *The Court Should Not Defer to Congress.*

Petitioner and *amicus* National Association of Stevedores argue that if a shipowner's liability is to be reduced in cases where the stevedore is concurrently at fault, such reduction should be created legislatively, and not judicially. The history of the grant of admiralty jurisdiction, coupled with the nature of the subject matter now in dispute, makes it quite clear that the apportionment issue is ripe for judicial analysis and

[24] If this were not so, Congress would be forced with frequent overhaul of legislation already in effect and otherwise functioning smoothly whenever, through evolution or other means, a new principle of law surfaces which had not been considered by Congress when the statute was enacted, perhaps decades earlier. Federal courts have implicitly recognized this by applying *Reliable Transfer* to actions arising under maritime legislation passed well before the first glimmer of proportionate fault. *See, e.g., Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (post-amendment case under the Longshoremen's Act); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 982 (5th Cir. 1978) (pre-amendment case under the Longshoremen's Act).

[25] See pp. 19-22, *infra*.

[26] *See, e.g., Harris v. American Investment Co.*, 523 F.2d 220, 224 (8th Cir. 1975) (analyzing common law fraud concepts underlying the Securities Exchange Act); *Tarlton v. Saxbe*, 507 F.2d 1116, 1122-23 (D.C. Cir. 1974) (analyzing common law right to protection of reputation in context of federal statute providing for maintenance by the F.B.I. of criminal records).

decision. This is particularly so where, as here, Congress has invited the courts to shape the new remedy.

The congressional committees charged with drafting the 1972 amendments considered the apportionment issue, but decided to leave it for judicial determination. The debate before the congressional committees did not center on the problem of apportioning liability between shipowners and stevedores in joint fault situations. Indeed, problems far more basic had caused a polarization of views which threatened to preclude the passage of any amendments during that session. As is evident from a review of the committee reports, shipowners, stevedores and longshoremen were most intensely concerned with the amount of benefits, the standard of care owed by shipowners to longshoremen, the availability to shipowners of indemnity from stevedores, and the geographical area in which longshoremen and harbor workers would be covered. So controversial were these issues that all others seemed collateral in comparison.

To avoid deadlock, a meeting stretched on far into the night, attended by representatives of all factions. The 1972 amendments took shape at that time, explaining why the bill as reported out of committee bore such little resemblance to any of the bills under consideration during the hearings. In reaching compromises on the key issues, many other problem areas were left for resolution by other means. Eugene Mittleman, minority counsel to the Senate Subcommittee on Labor, and E. D. Vickery, representing the National Maritime Compensation Committee, both attended the meeting and each has stated that various formulas were considered for apportioning fault between shipowners and stevedores, but that none was adopted. Unable to resolve the

issue in the time available, the parties wisely concluded that the matter should be left for the courts.[27]

Amicus Liberty Mutual makes the rather curious argument that "shipowners took no part in the hearings" (Brief p. 15) so that "their failure to participate in the legislative process, while in no way subject to criticism, does make it impossible for Respondent and its supporting *amici* to track their contentions [respecting the rights and defenses of shipowners] back to the legislature." (Brief p. 16). Mr. Vickery, among others, representing the National Maritime Compensation Committee, was a representative of and spokesman for a number of shipowners including several *amici curiae* supporting Respondent.[28] He expressed the legislative intent quite unequivocally:

> An interesting point is raised by the Committee reports in the following language: ". . . The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." It is apparent from this language that the Congress did not intend for the shipowner to be responsible for more than its proportionate part of a longshore-

[27] *See* Coleman and Daly, *supra* note 23, at 372-73.

[28] A list of the National Maritime Compensation Committee's members appears in Mr. Vickery's testimony before the Senate Subcommittee on Labor. Hearings on S. 2318, S. 525 and S. 1547 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 314 (1972). Three of the seventeen organizations comprising the National Maritime Compensation Committee were Lake Carriers' Association, one of *amici* herein; Mobile Steamship Association, Inc., of which Waterman Steamship Corp., one of *amici*, is a member; New Orleans Steamship Association which includes, among other *amici*, Delta Steamship Lines, Inc., and Lykes Bros. Steamship Co., Inc.; and Steamship Trade Association of Baltimore, Inc., which includes American Export Lines, Inc., and Moore-McCormack Lines, Inc., *amici* herein, together with Farrell Lines, and United States Lines, Inc., members of *amicus* Pacific Merchant Shipping Association, to name only a few of the vessel owners represented at the Committee hearings.

> man's damages in a situation where the accident resulted from the concurrent negligence of the shipowner and the stevedore.

Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act,* 41 Ins. Counsel J. 63, 66 (1974) (*quoting from* H.R. Rep. No. 92-1441, U.S. Code Cong. & Ad. News, 92d Cong., 2d. Sess., 4698, 4704 [1972]).

Mr. Vickery also said:

> Our cherished principal of "equal justice under law" has been virtually an idle dream in the longshoreman — shipowner — stevedore circular liability uses for many years. In this area, the 1972 amendments present to the Federal judiciary a rare and wonderful opportunity, one which is at the express invitation of Congress, to restore to this principle its full meaning as the courts mold the new cause of action for negligence.

Id. at 69.

The door to apportionment of financial responsibility in post-amendment longshore cases is now wide open to the courts. One federal district judge who considered this very point concurred. Although he bowed to the opinion of his chief judge for the District of Oregon in *Hubbard v. Great Pacific Shipping Co., Monrovia,* 404 F. Supp. 1242 (D. Ore. 1975), the distinguished district judge (now Chief Judge) in *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975), stated:

> *Reliable Transfer* overruled a century and a half of judicial precedent. I need not overcome such formidable obstacles. The 1972 amendments expressly authorize comparative negligence. Congress has left the mechanics of its application to the courts, as is customary.

Id. at 1233. Based on this guidance, it is the duty of the courts to accept the congressional directive and face the issues on their merits, as the Fourth Circuit did below.

Judicial determination of the question presented herein is further dictated by the grant of federal maritime power. The Constitution of the United States provides that: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ." U.S. Const. art. III, § 2. In analyzing the constitutional grant, Professor Black stated that

> this language expressly evidences a strong federal interest in the orderly and uniform judicial governance of the concerns of the maritime industry. In this connection it should be noted that the subject matter is the only one specifically singled out for attention in the jurisdiction section — that this clause embodies the only express constitutional attribution of federal judicial power to a named subject matter, except for the general language of the first clause of the section.

Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Colum. L. Rev. 259, 262 (1950).[29]

Apportionment of fault in admiralty has always been evolved through judicial lawmaking. In *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975), this Court

[29] The notion that congressional power extended to the substantive law of admiralty first surfaced in *The Lottawanna,* 88 U.S. (21 Wall.) 558, 577 (1875), and was further discussed in *Butler v. Boston & Savannah S.S. Co.,* 130 U.S. 527, 557 (1889). Until that time, congressional enactments concerning the federal maritime law had relied for their power on the commerce clause. *See The Bright Star,* 4 F. Cas. 139, 142 (No. 1880) (C.C.D. Mo. 1868) (Mr. Justice Miller on circuit). Even in recognizing congressional power to legislate in maritime matters, this Court has viewed the congressional role as supplementary and interstitial. The power is now generally viewed as deriving from the "necessary and proper" clause, U.S. Const. art I, § 8, taken in conjunction with article III's grant. *See The Thomas Barlum,* 293 U.S. 21, 42 (1934); *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 214-15 (1917); D. Robertson, *Admiralty and Federalism* 142-45 (1970). For a general discussion of this area, see Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century,* 67 Harv. L. Rev. 1214 (1954).

departed from the position it had taken in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952),[30] that long-standing judicial precedent is better resolved by the legislature than by the courts and stated its current view respecting the duty of the judiciary, particularly in admiralty matters:

> Finally, the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court. But the judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." . . . No statutory or judicial precept precludes a change in the rule of divided damages, and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by the Congress for personal injury cases.

421 U.S. at 409 (*quoting from Fitzgerald v. United States Lines, Co.*, 374 U.S. 16, 20 (1963)) (footnote omitted). *See Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) (contribution permitted among joint tortfeasors according to fault). As Professor Black has said,

> the relevant constitutional provision recognizes with the clarity of necessary implication that the United States has a deep national concern in the business of navigation and shipping upon the high seas and upon the lakes and rivers of the country, and declares that the concern is to be expressed and made articulate primarily through the judicial branch of the federal government. This national

[30] The deferral language in *Halcyon* was relied upon by the Ninth Circuit in *Shellman v. United States Lines, Inc.*, 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), and is now being urged by *amicus curiae* National Association of Stevedores herein.

> interest is not in the mere maintenance of a set of technical curiosa pored over in black-letter and chuckled at for their quaintness, but in the control and regulation of a complex of affairs.

Black, *supra* p. 19, at 261. Moreover, apportionment of financial responsibility is in keeping with judicially established principles of fairness. As this Court has said, "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief." *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

The argument is made that "the situation here is unlike that in *Reliable Transfer*, where Congress had failed to accept the opportunity to legislate in the field of collision liability."[31] To the contrary, the situation is identical. Just as Congress failed to enact specific legislation in the field of collision liability, thus prompting this Court to step in in *Reliable Transfer*, Congress similarly chose not to legislate specifically on the handling of waterfront accidents caused by the concurring fault of a vessel owner and stevedore despite extensive hearings preceding the 1972 amendments. The Court must take the same steps here, in accordance with its constitutional responsibility, in order to correct the obvious inequity which would exist if a party only slightly at fault for an accident were asked to bear the full financial burdens of the loss.[32]

[31] Brief of Liberty Mutual Ins. Co. at 31.

[32] The Court has been faced with this same problem in the past and, despite the existence of the Longshoremen's Act, on at least two occasions has reached decisions that were not expressly permitted by the Act. To the contrary, critics of each decision argued that the decisions directly contravened it. *See Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133 (1956) (creation of "warranty of workmanlike service," a breach of which would require the stevedore to indemnify the shipowner despite exclusivity language in the Longshoremen's Act); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962) (extension of coverage under the Longshoremen's Act into the "twilight zone" between federal

It has been suggested that since Congress failed to discuss specifically the apportionment question, it must have decided to leave the state of the law unchanged and therefore the courts should not impose their own views. This argument is also unpersuasive. This Court has not shown any reluctance to decide cases in areas which might be considered statutory gaps.[33] Prior to *Reliable Transfer,* for example, the United States had long adhered to a rule dating from *The Schooner Catherine v. Dickinson,* 58 U.S. (17 How.) 170 (1855), requiring an equal division of damages between two colliding vessels, each of which was to some degree at fault. By 1975, however, the United States was virtually alone in this position, Congress having failed to adopt the Brussels Collision Convention of 1910 which called for apportionment of damages according to fault. In *Reliable Transfer,* the divided damages rule was at last put to rest by the Court despite the failure of Congress, over a period of 65 years, to obtain the same result legislatively.

Finally, the National Association of Stevedores argues that since Congress has been conducting oversight hearings for two years, there is even greater reason to await further Congressional action. A review of that portion of the hearings published to date, however, reveals that stevedores are complaining about

and state jurisdiction despite language in the Longshoremen's Act limiting coverage to areas not covered by state law, 33 U.S.C. § 903(a) (1976); *Czaplicki v. The SS Hoegh Silvercloud,* 351 U.S. 525 (1956) (injured longshoreman permitted to maintain third-party action despite statutory assignment to his employer). The critical factor in these cases is not whether they were correctly decided, but that they were decided by the Court on their merits.

[33] *See Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970) (judicial creation of remedy under the general maritime law for wrongful death in territorial waters despite the failure of Congress to include such a remedy in the Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.* (1976)).

their compensation exposure rather than third-party problems.[34]

B. *Joint and Several Liability Has No Application to This Case.*

The notion that the opinion below abrogated the maritime and common law doctrine of joint and several liability was first asserted by *amicus* Liberty Mutual Insurance Company on its fledgling flight into this protracted litigation in its Brief in Support of the Writ of Certiorari (pp. 9-10). It had not heretofore been raised by the parties themselves nor by *amici curiae* in their support at any previous stage of the proceedings. The argument now advanced warrants discussion as *amicus* Liberty Mutual, at least, appears to place its greatest reliance upon it.

As applied to the instant litigation the argument is certainly unique, but will not withstand scrutiny. Liberty Mutual itself recognizes the basic distinction between the usual situation and the one existing here:

[34] Part I of the Oversight Hearings (1977) contains 953 pages, of which 377 (39.6%) are devoted to stevedoring interests, 199 (20.9%) to builders of small boats and marine operators, 151 (15.8%) to insurance interests, 87 (9.1%) to shipbuilders, 72 (7.6%) to regulatory interests, 32 (3.4%) to longshoremen, 21 (2.2%) to fishermen, and seven each (0.7%) to hospitals and general comments. Third-party actions are virtually ignored. The reason stevedores did not address the subject is evident from the comments of Donald B. Robertson, Vice-President of California-based Metropolitan Stevedoring Company:

> Prior to November 26, 1972, we were picking up about 90 percent of the costs of third-party cases filed against the vessel. At that time, we had indemnity over problems. We have escaped this liability, at least for now.

Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part I) before the Subcomm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. at 752 (1977).

> In the instant case the question, more precisely, is one of "several" liability for, since the employer has a statutory immunity from tort liability to the employee, he is not a "tortfeasor", nor is his liability "joint". (Citing authority).

Brief of Liberty Mutual Ins. Co. at 3. What Liberty Mutual fails to appreciate is that the Longshoremen's Act precludes any application of its "joint and several" argument to the facts of this case. This was carefully explained by Judge Friendly in *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978). The basic proposition was set forth as follows:

> When two or more persons' torts together cause injury, each is fully liable to the victim.

Id. at 718. Judge Friendly then noted the precise exception to the general rule which prevails here:

> Workmen's compensation statutes like the LHWCA added an important new element to the problem because of their exclusive liability sections, as exemplified by 33 U.S.C. § 905(a).

Id. at 719. Thereafter, several cases were cited, all of which demonstrated that either on a "linguistic analysis" or on the statute's elimination of the employer's tort liability to the victim, it was thus "impossible for him to be jointly liable with any other party." *Id.*

Liberty Mutual argues that although the word "joint" is inapplicable, the vessel is nonetheless "severally" liable. In so doing, it begs the question. By both legal and ordinary dictionary definitions "joint" and "several" presuppose the existence of two or more parties. Here we are left with the proposition that when two parties are concurrently at fault for an accident, one of whom has statutory immunity from tort liability and cannot within the meaning of "joint and several" be considered a joint or any other kind of tortfeasor, the other party, standing as the only tortfeasor against

whom a judgment for damages may be obtained, suddenly becomes "severally" liable. Severally with whom?

The traditional doctrine of joint and several liability operates to permit a plaintiff who has been injured by two or more tortfeasors to recover his entire damages from any one of them. Plaintiff may elect to proceed against one joint tortfeasor individually or may join all those responsible for his injuries in a single action. Subject to the limitation that plaintiff is entitled to but one full recovery, he may choose to proceed against each joint tortfeasor *seriatim* until he has been made whole. This was born of a natural solicitude for the victim by the courts which did not want to see him go penniless.[35] The doctrine of joint and several liability served primarily to protect plaintiffs from defendants unable to pay judgments entered against them. The Longshoremen's Act, however provides safeguards to ensure the payment of compensation benefits. 33 U.S.C. § 932 (1976). Thus, there is no need to protect longshoremen from impecunious stevedores.

[35] The collision cases relied upon by Liberty Mutual hardly advance its argument. *The Washington and The Gregory*, 76 U.S. (9 Wall.) 513 (1870), *The Alabama and the Gamecock*, 92 U.S. 695 (1876), and *Phoenix Ins. Co. v. The Atlas*, 93 U.S. 302 (1876), all affirm the longstanding rule of division of damages caused to an innocent party between two vessels found to be at fault. This rule, originally requiring damages to be equally divided (the "moiety" rule), was modified by this Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), to require that damages be divided according to each vessel's proportionate degree of fault. Where the moiety rule was applied, the right of an innocent party to collect his entire damages from one of several vessels found to be at fault was contingent on the remaining vessel's inability to bear her proportionate share of the damages.

In cargo cases, such as *The Chattahoochee*, 173 U.S. 540 (1899), and *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), where the carrying vessel was immune from direct liability by reason of the Harter Act, the non-carrying vessel was able to recoup a portion of amounts paid to cargo from the carrying vessel through division of overall damages.

Despite the contention that the Court below "indicated ignorance"[36] of the applicability of joint and several liability in a maritime context, the opinion of Judge Haynsworth amply demonstrates the error of such a suggestion. The Fourth Circuit understood, considered and rejected any idea of "several" liability for all of Petitioner's damages and noted that where a single joint tortfeasor has been compelled to pay a plaintiff's entire judgment he has, under the law of most jurisdictions, a concomitant right to indemnity and/or contribution — a right that has been abrogated by the 1972 Amendments.

> The longshoreman, looking to the many references in the statute and its legislative history to the principles of land based negligence law, would import into those references those principles of the common law which permit full recovery by an injured plaintiff against any single joint tortfeasor, but that common law doctrine is mitigated in many states by the provision of rights of contribution or of indemnity from other joint tortfeasors, or has been supplanted by a system of comparative negligence. In the 1972 amendments the Congress clearly provided that the ship was to receive no indemnity or contribution from the stevedore, and it is hardly rational to suppose that, without any right of indemnification, the Congress intended to impose a liability upon the ship for all damages suffered when the ship may have been only slightly at fault and the stevedore very greatly so.

577 F.2d at 1155, Petitioner's Appendix at A56-57. Full recovery by Petitioner Edmonds against the lone tortfeasor, the vessel owner, was rejected because its application is wholly inconsistent with the language and purpose of the Longshoremen's Act and inequitable in its result. The rejection of the argument had nothing whatever to do with concepts of joint and several

[36] Brief of Liberty Mutual Ins. Co. at 5.

liability, common law or otherwise. The decision was based on a sensible reading of Section 905(b) of the Longshoremen's Act and this Court's views on fair apportionment of responsibility for accidents in accordance with fault as typified by *Cooper Stevedoring* and *Reliable Transfer.*

C. *Adoption of an Equitable Credit Will Not Give Rise to "Tripartite Litigation."*

Petitioner and his supporting *amici* argue that the decision below requires "circuitous third party suits,"[37] "dissipates stevedore resources,"[38] and puts the stevedore "right back where he was prior to 1972."[39] Such assertions ignore the proof required for an injured longshoreman to recover damages in a third-party suit. Even in circuits where credit defenses have been rejected, longshore plaintiffs must prove that the negligence of a third party proximately caused their injuries. Where actions or omissions of both shipowner and stevedore conceivably contributed in causing an accident, shipowners will inevitably defend by claiming that the plaintiff's injuries were caused solely by the negligence of his stevedoring employer. Since that theory, if adopted by the trier of fact, would preclude any recovery by the plaintiff, he must inevitably argue that the ship's negligence, and not the stevedore's, caused his injuries. In so doing, the plaintiff will introduce that evidence tending to cast liability on the shipowner and exculpate the stevedore through use of the stevedore's employees as witnesses. Dual representation of the stevedore is unnecessary.[40]

[37] Brief of Petitioner at 42.

[38] *Id.* at 45.

[39] *Id.*

[40] Indeed, compensation carriers (or self-insured stevedores) have always been free to informally monitor third

Amicus Liberty Mutual Insurance Company observes (brief p. 29) that in Baltimore and Norfolk attorneys for shipowners have been filing motions requiring the joinder of employers and their insurance carriers at the inception of litigation. In Baltimore, by strange coincidence, counsel for the employers on the one hand, and the vessel owners on the other, are identical to counsel here for *amici* Liberty Mutual Insurance Company and American Export Lines, *et al.*, in a total of six consolidated cases.[41] While it is true that the motion to join the employer was granted in one such case by the Honorable Alexander Harvey, II,[42] the matter of how to handle the problem is now being fully reconsidered in the District of Maryland, the cases having been referred to the Honorable Joseph H. Young for decision. There is no finality to the problem as this brief is written. Of course, the motions were made pursuant to the suggestion of the court below in this case.[43]

party actions and provide assistance to the plaintiff's attorney in the form of documentation and favorable witnesses. Should a carrier determine that the plaintiff's lawyer was not handling the litigation properly, thereby threatening the recoupment of its lien, the carrier could intervene as an interested party under Fed. R. Civ. P. 24. The paucity of cases in which such joinder appears suggests that stevedores and their carriers are quite satisfied with representation of their interests by plaintiffs' counsel. Certainly, until this stage of the litigation, Liberty Mutual was satisfied with its representation because it declined to participate. See note 14 and accompanying text, *supra*.

[41] White v. Moore-McCormack Lines, Inc. (Civil No. Y-78-553); Bledsoe v. Scheepvaart Maats-Trans-Ocean B.V. (Civil No. K-78-552); Olczak v. Dinaco Compania De Navegacion, S.A. (Civil No. M-78-554); Fernandez v. Scheepvaart Maats-Trans-Ocean B.V. (Civil No. B-78-555); Fernandez v. Moore-McCormack Lines, Inc. (Civil No. H-78-556); and Wetters v. Moore-McCormack Lines, Inc. (Civil No. H-77-858).

[42] Wetters v. Moore-McCormack Lines, Inc. (Civil No. H-77-858).

[43] In future cases, the stevedore might be made a party plaintiff so the rights of all parties may be adjudicated in one proceeding.
577 F.2d at 1156, Petitioner's Appendix at A61.

The interesting aspect of the Baltimore cases, at least so far as this proceeding is concerned, is that counsel are in essential agreement that there is no need for active participation by stevedores necessitating the expense of litigation. The court below was concerned that stevedores be given actual notice of litigation in which they have a direct financial interest. In Baltimore, at least, it has been the long-standing practice for employers or their carriers to be named as "use plaintiffs" in order to protect their liens and this was so long before the 1972 amendments with no active participation whatever by the use plaintiffs in the ensuing litigation.[44] At least one salutary reason for the practice of actually naming the real party in interest as a use-plaintiff is to prevent such party from alleging at the conclusion of litigation that a finding of fault on its part should not be binding either because of a lack of notice or of the right to participate. This latter right, of course, is always available by intervention though rarely necessary or utilized.

Our own preference would be to adopt the suggestion of Judge Skopil in *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F. Supp. 1224 (D. Ore. 1975):

> If my proposal is to become law, it must afford the stevedore due process. Future cases will have to define the substance and procedure of this protection. Fed. R. Civ. P. 24 provides the stevedore with means of intervening to protect his interest if he so desires. It would seem that the Court should assume responsibility for guaranteeing that he receives notice. The Court could require the defendant shipowner to provide such notice when he pleads the comparative negligence of the plaintiff. Alternatively, the Court could provide notice on its own initiative through the Clerk's

[44] *Poleski* v. *Moore-McCormack Lines*, 21 F.R.D. 579 (D. Md. 1958). As a use-plaintiff, the stevedore could be treated as a non-party for discovery purposes Cf. *Jones v. Rederai A/B Soya*, 31 F.R.D. 524 (D. Md. 1962).

> office. Neither step may be constitutionally required, by it is favored by interests of fairness and expediency.

398 F. Supp. at 1234.[45]

We do not consider that there is any reasonable justification for the argument that application of an Equitable Credit will promote tripartite litigation. But even if there were, this Court has already expressed its dissatisfaction with continuing an unjust rule merely to relieve court congestion:

> Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

United States v. Reliable Transfer Co., 421 U.S. at 408. Mr. Justice Stewart's observation respecting the unfairness of the moiety rule in collision cases is even more pertinent here, where Petitioner and his supporting *amici* all argue that *any* ship's negligence will result in the vessel being held liable for *all* the plaintiff's damages.

D. *Application of an Equitable Credit Does Not Impose Unjustified Financial Burdens on Injured Longshoremen or Their Employers.*

Petitioner and all *amici curiae* supporting him claim that the decision below subjects them to substantial and unjustified economic hardship. Their arguments, however, fail to come to grips with the dollars and cents involved and, particularly, the gross inequity of requiring a partially negligent third party to pay 100% of the damages.

[45] A more complete discussion of the erroneous assertion that the application of an Equitable Credit will promote tripartite litigation is contained in the brief of *amicus curiae* Pacific Merchant Shipping Association beginning at heading III B.

1. The Injured Worker.

The Ninth Circuit cited the unfairness to an injured longshoreman of reducing his third-party damages on account of his employer's negligence as one of its principal reasons for reversing the district court in *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 680 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). Similarly, the Fifth Circuit in *Samuels v. Empresa Lineas Maritimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), believed there was an unjustified burden on the injured longshoreman relying, primarily, on the earlier Ninth Circuit cases of *Shellman* and *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Neither court understood or analyzed the application of an Equitable Credit. All that was done was to compare the dollar amount of damages suffered by the worker with the payment required to be made by the vessel owner. Upon noting that the sum received from the vessel owner was less than the damage figure, erroneous and inequitable conclusions were reached.

An analysis of *Frasca v. Prudential-Grace Lines*, 1975 A.M.C. 1130, 1143 (D. Md. 1975), in which the Equitable Credit was given its name and first applied, serves well to illustrate how longshoremen allegedly suffer by the application of a credit and to expose the fallacy of that reasoning. The circumstances were these, pursuant to specific jury findings:

Total damages	$21,000.00
Frasca's fault	10%
Stevedore fault	50%
Vessel fault	40%

The compensation lien was $5,438.30. Applying the Equitable Credit, judgment was rendered against the vessel owner for 40% of $21,000.00 or $8,400.00. Since the employer's 50% fault for the injury deprived Frasca

of damages he otherwise would have received in the sum of $10,500.00 (one-half of $21,000.00), and since that sum exceeded the amount paid by the employer in compensation, Frasca was not required to repay the lien out of the damage award against the vessel owner. His net recovery, therefore, amounted to $13,838.30.[46]

If the Equitable Credit had not been applied, the damage award would have been reduced 10% by reason of Frasca's contributory fault to $18,900.00. Frasca's net recovery would thus have been $5,071.70 greater than his recovery with the Equitable Credit (the difference between $18,900.00 and $13,838.30). Critics of the credit thus point to *Frasca* as a typical case in which the application of an Equitable Credit worked to the financial disadvantage of the injured worker. However, the criticism proved premature, as it often will with the possibility of continuing compensation payments.

That portion of the original decision in *Frasca* granting an Equitable Credit was later rendered moot by a judgment n.o.v. for the shipowner. 394 F. Supp. 1092 (D. Md. 1975). After the lower court decision, however, Frasca returned to the Deputy Commissioner for additional compensation, and was awarded permanent partial disability of $9,571.02,[47] making the amount of compensation ultimately paid $15,009.32 ($5,438.30 + $9,571.02). Under the Equitable Credit or any other apportionment formula, the stevedore's liability for compensation benefits should not depend on the purely procedural question of whether or not the injured worker sought a compensation award for permanent disability *before* pursuing his third-party action. Thus, the stevedore's ultimate compensation exposure in *Frasca* of $15,009.32, and not the $5,438.30 listed as the compensation lien at the time of trial, represents the

[46] This resulted from the court's application of Principle [4] of the formulation set forth, *supra* p. 11.

[47] Letter to counsel for *amici curiae* from Frasca's attorney dated July 14, 1976.

stevedore's potential payments under an Equitable Credit. Had an Equitable Credit been granted, because the negligence of his employer had reduced his recovery by an amount ($10,500) in excess of his compensation payments ($5,438.30), Frasca could have gone back for additional compensation. Every dollar of compensation received up to $10,500 could be retained, since that was the amount by which the stevedore's negligence would have reduced Frasca's recovery.[48] Since over $10,500 in compensation was owed, application of an Equitable Credit *would not have reduced Frasca's total recovery from all sources by as much as a penny.* It would, however, have lowered his employer's compensation exposure to $10,500 from the $15,009.32 actually paid.[49]

In its initial opinion below, the Fourth Circuit rejected the argument that a credit imposed an unjustified burden on injured longshoremen:

> They have no inherent right to recover from a vessel damages caused by the negligence of a stevedore. To the extent the longshoreman receives a somewhat lesser amount than he otherwise would have, his complaint lies not with the result

[48] In all cases involving application of an Equitable Credit, the stevedore's liability for payment of workmen's compensation equals either its full statutory liability or that amount by which its negligence has reduced its injured employee's third-party recovery, whichever is lesser. The exact application of this rule, however, will vary from case to case depending upon the facts presented. Thus, development of this aspect of the Equitable Credit might best be left to the district courts so that the varying factual situations might be taken into account and stevedoring interests will have every opportunity for full representation.

The suggested rule is explained in greater detail in the appendix hereto at pp. 6a-7a.

[49] It is evident from a similar review of the underlying facts in *Shellman* that the Ninth Circuit failed to do its homework in that case. *Shellman* is analyzed in detail in the appendix hereto at pp. 4a-5a.

> reached in this case, but more basically with the compensation scheme of the Act that prevents him from recovering damages from his employer, for a concomitant of the stevedore's no-fault liability is the exclusivity of the compensation remedy against it. Thus, even as the longshoreman receives a lesser recovery, he benefits from one of the Act's many trade-offs; he becomes entitled to statutory benefits without having to prove fault on the part of anyone. As will be later apparent, he also benefits from the negligence of the vessel, but only to the extent of its own fault.

558 F.2d 186 at 192, Petitioner's Appendix at A37.

Application of the Equitable Credit calls for no change whatever in the traditional sharing of fault in maritime cases: an injured seaman or longshoreman, in maritime causes of action, must suffer the consequences of his own contributory fault by a reduction of his otherwise recoverable damages in direct proportion to his degree of fault. An Equitable Credit carries this sensible sharing of proportionate fault to its logical conclusion. It includes the shipowner and stevedore as well, in conformity with the legislative intent of the 1972 amendments.

The only law review commentary to date analyzing the opinion below agreed that the Equitable Credit

> [R]epresents the fairest solution for the parties, while still fully consistent with the words of the amendments and the intent of Congress in enacting them.

Note, *Apportionment of Damages Under 1972 Amendments to Longshoremen's and Harbor Workers' Act,* 52 Tul. L.R. 602, 609 (1978), on panel decision.

2. The Employer

In its initial opinion, the Fourth Circuit stated: "If we were left purely to our own devices, an attractive holding might be to bar the stevedore from asserting an equitable lien if it were negligent . . . ." 558 F.2d at 192,

Petitioner's Appendix at A40. While the panel felt it was compelled to ensure full lien repayment under the principle first announced in *The Etna,* 138 F.2d 37 (3d Cir. 1943), the court *en banc* retreated from such a view, leaving the question of lien recoupment undecided. Automatic lien recoupment in the face of stevedore negligence is repugnant to the equitable concept of subrogation.[50] It does not follow from a reading of *The Etna* that the stevedore must be repaid its compensation lien.

Pursuant to *The Etna* and its progeny, stevedores are now said to possess a common law right of equitable subrogation in any funds generated by the employee's suit against the shipowner. Section 162 of the *Restatement of Restitution* states that where one person discharges the obligation "owed by another" he is entitled to be subrogated to the position of that person against the one causing the damage. However, the payment of compensation by an employer does not discharge the obligation of a negligent third party to respond in damages. Rather, the stevedore's duty to pay compensation is based on wholly different concepts. Furthermore, the stevedore's right to reimbursement of its compensation payments out of any recovery from a third party, whether obtained by statute or by the doctrine of equitable subrogation, existed in order to prevent the unjust enrichment which would accrue to a longshoreman if he were allowed to recover doubly for his injuries.[51]

[50] *See* Restatement of Restitution § 162 (1937).

[51] This has recently been noted by one court:

> The statutory and jurisprudential right of subrogation, created for the benefit of the employer [stevedore] who has made compensation and medical payments to his employee [longshoreman], exists to prevent double recovery by the employee.

Davillier v. Cavn Venezuelan Line, 407 F. Supp. 1234, 1237 (E.D. La. 1976).

Both the National Association of Stevedores and Liberty Mutual Insurance Company argue that if the stevedore were not permitted to recover *all* of its compensation payments, a distinct hardship would be worked upon the stevedore and its compensation carrier. Generally, they argue that application of an Equitable Credit demonstrates ignorance of the cost of waterfront safety to employers and their carriers who must pay the substantially increased benefits accorded by the amended Longshoremen's Act. They also argue that these financial burdens were infinitely greater than anticipated because the coverage of the Act extended much farther ashore than was contemplated by employers and their carriers at the time of the passage of the 1972 Amendments. Finally, they urge that the entire purpose of the amendments was to limit the liability of stevedores strictly to the payment of compensation benefits so that the resources of stevedores and their carriers could be husbanded in order to pay the increased benefits.[52]

Vessel owners were not involved in the litigation[53] which resulted in geographical extension of the Act beyond the limits stevedores contemplated when the 1972 amendments were enacted. The sole position of

[52] Brief of *amicus* Liberty Mutual Insurance Company, pp. 29-31; brief of *amicus* National Association of Stevedores, pp. 7, 9, 17-22; brief of Petitioner at p. 17. It was further argued by *amicus* Association of Trial Lawyers of America that inasmuch as § 905(a) proscribes the defenses of negligence of a fellow servant, assumption of risk and contributory negligence, there is no justification for limiting the vessel to its percentage of fault for an accident. Section 905(a), however, has absolutely no application to suits against third parties. It relates solely to an action by an injured worker against his employer if the employer fails to pay compensation benefits and, in such suit, the *employer* is not permitted to raise the defense of negligence of a fellow servant, assumption of risk or the contributory negligence of the employee.

[53] *Northeast Terminal Co. v. Caputo,* 432 U.S. 249 (1977).

Respondent and *amici curiae* herein is that shipowners should not be called upon to pay unanticipated expenses of stevedores which are totally unrelated to the issues of this litigation.

Stevedores have, however, been allowed to husband their resources in order to pay increased compensation benefits.[54] This was accomplished by eliminating *Ryan* indemnity as it previously existed. It did not, however, create a reverse-*Ryan* indemnity situation so that substantially negligent stevedores could be made whole by minimally negligent vessel owners or, for that matter, so that stevedores who were in any way negligent could totally escape all financial responsibility for their fault. All that the Equitable Credit requires is that stevedores or their carriers pay their fair share of the financial burden not to exceed, however, the upper limits of their compensation exposure.

While unjust enrichment to or double recovery by an injured longshoreman is admittedly improper, there is another side to the coin. If it is wrong for the injured worker to be unjustly enriched, it is even more unjust for a negligent employer to profit by his own wrong and obtain a windfall recovery. In urging that the increased benefits paid under the 1972 amendments have resulted in enormous expenses to stevedoring employers and their compensation carriers, the fact that the ultimate burden is shouldered by the vessel owner is ignored. Stevedoring charges are paid by the shipowner. These are calculated to recoup all expenses of the stevedore and provide an additional profit. Thus, since premiums for workmen's compensation insurance are one of the costs of a stevedoring operation, the cost of premiums, which reflect the vastly increased benefits to which

[54] It is contended that this was one of the primary purposes of the 1972 amendments. Brief of National Association of Stevedores, p. 18.

waterfront workers are now entitled when they sustain personal injuries, are paid initially by shipowners as a part of the rates for stevedoring services.

This passing along of the expense to the vessel owner was discussed prior to the passage of the 1972 amendments as well as at the oversight hearings subsequent to the amendments.[55] It is obviously inappropriate to permit the employer to effect a double recovery when its fault was a contributing cause of the accident, merely because *some* fault by the vessel owner

[55] Francis A. Scanlan, testifying on the proposed 1972 amendments before the Senate Subcommittee on Labor on behalf of the National Maritime Compensation Committee, discussed the realities of compensation premiums:

> Now, this was the single most expensive item of doing business, outside of direct labor costs. And it is a tremendous cost which must be included in the stevedore's rates that are paid by the shipowners; because ultimately, the shipowner in this case must pay the bill; and he in turn, of course, will pass it on to the shippers and consignees, who use his services.

Hearings on S. 2318, S. 525 and S. 1547 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 261 (1972).

At the oversight hearings, Albert P. Kelley, Jr., Treasurer of John T. Clark & Son, a stevedore employer, testified:

> The ships are bearing sufficient burden of costs when we have to pass on our insurance rates.

Oversight hearings on the Longshoremen's and Harbor Workers' Compensation Act (Part 1) before the Subcomm. on Compensation, Health and Safety of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) at p. 441. Julius Stern, a retired member of the International Longshoremen's and Warehousemen's Union testified that: "The stevedoring company contracts labor. No matter what the insurance costs are it is paid by the people that own the ships." *Id.* at 143. Similarly, H. Terrence Keenan, Insurance Manager for Strachan Shipping Company (a stevedore) stated that: "Our charges to our principals, our customers, are based on a cost of doing business." *Id.* at 353.

likewise contributed to the accident.[56] The handling of the stevedore's lien according to the mechanics of an Equitable Credit as suggested herein results in the sensible sharing of the financial burdens of an industrial waterfront injury-producing accident amongst the parties at fault. Such an approach meets the formula recently established by this Court in *Reliable Transfer* and *Cooper Stevedoring*, and comports with the reasoning of Judge Skopil in *Croshaw:*

> The stevedore's right to reimbursement, being equitable in nature, is subject to equitable regulation. . . . There is no equity in the principle that a

[56] This fact was recognized recently by the Ninth Circuit in *Olivas v. United States*, 506 F.2d 1158 (9th Cir. 1974). There the government contracted with a private company to do certain work for the Air Force. Olivas, one of the contractor's employees, was injured on the job. He collected workmen's compensation and then initiated an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1970). The government sought a set-off for compensation benefits paid by the employer's insurance carrier, and the carrier resisted. After analyzing the insurance contract, the court concluded that in effect "the government paid the insurance premiums and should get the credit for the payments made under the policy." 506 F.2d at 1163.

If the Fourth Circuit is reversed, the shipowner will, in effect, be required to repay the carrier's entire lien. This is a windfall double recovery for the insurance company. It obtains premiums and then recoups from the very shipowner who has paid the premium. This anomaly is further heightened by the shipowner's payment of damages to Edmonds. The third-party award was based in large part on Edmonds' claim for lost wages, both past and future. The major goal of workmen's compensation, however, is income replacement. Thus, absent a credit, the vessel owner in this case would effectively pay for Edmonds' lost wages *three times:* (1) through the increased premiums passed along to it in the stevedoring contract; (2) repayment of the stevedore's full lien; and (3) payment of damages to the longshoreman. *Amici curiae* know of no legal principle which countenances such a result.

> stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence. If this lien is to be truly equitable, it must be diminished according to that negligence.

Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk, 398 F. Supp. 1224, 1234 (D. Ore. 1975).

V.

PERMITTING NEGLIGENT STEVEDORES TO RECOVER THEIR ENTIRE COMPENSATION LIENS FROM THIRD-PARTY JUDGMENTS WOULD DEFEAT TWO MAJOR LEGISLATIVE GOALS OF THE 1972 AMENDMENTS.

Unless the stevedore bears some portion of the financial risk when it is concurrently at fault with the vessel owner for an injury-producing maritime tort, two aspects of the legislative intent which brought about the 1972 amendments to the Act are likely to be defeated: first, stevedores' incentive to enforce safety standards rigorously; second, the desire to reduce personal injury litigation and to avoid further straining of already crowded court dockets.

A. *Negligent Stevedores Entitled To Full Lien Recovery Would Have Diminished Incentive To Maintain Effective Safety Programs.*

Despite the elimination of vessel liability for maritime injuries produced by unseaworthy conditions, Congress fully intended that shipowners bear financial responsibility for injuries caused by negligence — a concrete incentive to vessel owners to do all in their power to promote safety programs which would sharply reduce the alarmingly high rate of accidents to maritime workers. Congress was quite specific in emphasizing this vitally important goal:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

House Report, *supra* p. 18, at 4704.

It was not, however, the Congressional intent to permit the stevedore to go scot free when its own fault contributed to an injury-producing accident. To the contrary, Congress was just as specific in delineating the concomitant duty of the stevedore to promote safety, an empty requirement if the stevedore is permitted to recover its entire lien merely because *some* fault by the vessel contributed to the accident.

> It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by *assuring that the employer bears the cost of unsafe conditions, serves to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.*

Id. at 4699 (emphasis added). The stevedore's incentive is lost, and the intent of Congress clearly thwarted, if the stevedore is permitted to recover all of the "adequate workmen's compensation benefits" the amended Act requires it to pay by the mere showing of some slight fault on the part of the vessel.

B. *Full Lien Repayment Would Discourage Stevedores From Partial Waivers To Effect Settlements And Would Prompt A Proliferation Of Litigation.*

Though not expressly stated, an implicit and clearly understood legislative intent when the 1972 amendments were enacted was the reduction of third-party litigation and the crowding of court dockets with such litigation.

> The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committee's attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

Id. at 4702-03.

Typically, a potential third-party suit is one in which a reasonable plaintiff's attorney sees a possible recovery in excess of compensation benefits already paid to his client by the stevedore based on some negligence on the part of the vessel. Of course, if there were no ship negligence, there would be no basis for a third-party claim. Just as often, however, in fact more often than not, stevedore fault also contributed to the accident. Therein is the setting which brings about the difficulty in disposing of third-party claims unless each of the parties involved shares equitably in the financial burdens of potential third-party claims: the injured worker for his contributory fault, the shipowner for its negligence and the stevedore for its concurring fault.

In those instances in which there is apparent substantial fault on the part of the stevedore, and the vessel owner sees that it might escape with a finding of no fault on its part, the case will inevitably be tried unless the stevedore is willing to waive a portion of its lien or, in certain circumstances, pay a given sum in excess of its current lien to settle future compensation exposure in the event of a verdict in the vessel's favor. Such an impasse can be avoided only if courts require stevedores to assume a portion of the financial burden in recognition of their portion of the fault which contributed to the accident.

The Fourth Circuit recognized the fallibility of the argument that a partially negligent vessel owner be required to pay 100% damages. Only one further step is needed to bring about the result which will fully implement the two-fold legislative intent that vessels not be required to pay for stevedore fault and that *all* parties bear a portion of the financial burdens which accompany most third-party claims. The method, or mechanics, of such sharing is set forth elsewhere in this brief, with our suggestion that the actual application of the Equitable Credit be left to the trial courts because of differing factual situations from case to case. The desirability of such sharing, from the viewpoint of both equity and ease of out-of-court settlements, was well expressed in the majority opinion of the Third Circuit in *Marant v. Farrell Lines,* 550 F.2d 142 (3d Cir. 1977), relying on Mr. Justice Stewart's observation in *Reliable Transfer*:

> The concurring opinion expresses concern that any credit or apportionment rule would lead to increased litigation and that, even "if" the present rule is unfair, change should come from Congress. This court being already inundated with LHWCA litigation to interpret the 1972 amendments, it is difficult — though concededly frightening — to imagine an increase. It would seem as likely, however, that a rule which equitably apportioned liability according to fault might decrease litigation and promote settlement, especially by removing the incentive of a large judgment against a shipowner who is only partly at fault. As the Supreme Court has recently observed: "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements.

550 F.2d at 147 (*quoting from United States v. Reliable Transfer Co.,* 421 U.S. at 408.)

CONCLUSION

It is difficult to justify a system of awarding damages which permits the following anomalous results: if a man is injured through no fault of the vessel owner and 100% fault of the stevedore, or less if combined with the worker's own fault, the stevedore pays full compensation with no right of repayment. But if there is any fault by the vessel (as little as 30%, 20%, 10% or even 1% with corresponding stevedore fault of 70%, 80%, 90% or even 99%)[57] the grossly negligent stevedore recovers its entire lien and the vessel pays 100% damages. Such a system *always* works to the financial advantage of the stevedore; *always* to the disadvantage of the vessel owner; and the injured workman is the only one of the three parties involved who is *always* required to bear the financial burden of his own proportional contributory fault. Dean Prosser, in discussing the analogous topic of contribution, criticized this all-or-nothing approach:

> There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, . . . while the [other] goes scot free.

[57] The example is not far-fetched. On January 19, 1979, in *Anthony Trevellick v. Flota Mercante Grancolombiana, S.A.* Civil No. C-77-1604-WHO (N.D. Calif.), a district court jury apportioned fault and found damages in a maritime personal injury case as follows:

Plaintiff's fault	—	70%
Stevedore's fault	—	29%
Vessel's fault	—	1%
Total Damages		—$167,000

Judge Orrick had not entered judgment at the time this brief was prepared. Presumably, he will follow the Ninth Circuit cases of *Shellman* and *Dodge* which will mean that the 1% negligent shipowner pays the plaintiff's full damages of $50,100 (a 70% reduction because of his contributory negligence) and the 29% negligent stevedore will recover its entire compensation lien which we are advised amounts to approximately $29,000.

W. Prosser, *The Law of Torts* § 50, at 307 (4th ed. 1971). If such a result is to be countenanced, it strongly suggests that Mr. Bumble's comment had great merit.[58]

Traditional arguments based on history and *stare decisis* can be made by foes of the Equitable Credit. If they were made to the Ninth Circuit in *Shellman* and *Dodge,* or to the Fifth Circuit in *Samuels,* there is no evidence of them in the opinions. Such arguments were, however, made to the Supreme Court in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975). They were met head on. Since those arguments were "illogical", "arbitrary" and basically "unfair", 421 U.S. at 404, this Court overturned many years of contrary precedent and reached the sensible results those decisions demonstrate. In doing so, Mr. Justice Stewart stated in *Reliable Transfer* that:

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in *The Schooner Catherine* — the "just and equitable" allocation of damages. *And worldwide experience has taught that that goal can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible.*

421 U.S. at 410-11 (Emphasis supplied.)

This Court has long demonstrated its willingness to take the lead in hard cases, especially in the field of

[58] "If the law supposes that," said Mr. Bumble . . . "the law is a ass, a idiot." Charles Dickens, *Oliver Twist,* Chapter 51.

maritime law. *Amici curiae* urge the Court to do so once again so that the goals of the 1972 amendments can be carried out in accordance with the legislative intent and recent decisions affecting loss distribution in maritime cases.

For all the foregoing reasons, the judgment below should be affirmed and this Court should instruct future courts handling longshoring personal injury litigation to apply an Equitable Credit which will fairly and equitably apportion loss in accordance with fault.

Respectfully submitted,

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American Export
Lines, Inc.

APPENDIX

MECHANICS OF THE EQUITABLE CREDIT

Application of the Equitable Credit in cases where the compensation lien exceeds the damages attributable to the fault of the stevedore is demonstrated by the following situation:

Vessel's fault	60%
Stevedore's fault	30%
Longshoreman's fault	10%
Damages	$10,000
Compensation lien	$4,000

The longshoreman will be entitled to a recovery of $6,000 against the vessel (sixty percent of $10,000). Because the fault of the stevedore reduced the longshoreman's recovery by $3,000 (thirty percent of $10,000), the injured worker would only be required to repay $1,000 ($4,000 [amount of lien] minus $3,000 [reduction in recovery due to stevedore's fault]) of the workman's compensation payments previously received. The longshoreman's total recovery is therefore $9,000: $4,000 previously received in workmen's compensation benefits plus $5,000 remaining from his judgment against the shipowner after the repayment of $1,000 to his employer. Because $9,000 was all he would have been entitled to in any event, he cannot be heard to complain of any injustice. The stevedore was statutorily protected from payment of an amount greater than its responsibility under the compensation act. However, due to a sharing of fault with the shipowner, the stevedore has escaped with less than its full compensation liability. Thus, the fortuitous finding of ship's negligence has provided the concurrently negligent stevedore with a $1,000 lien recoupment. Obviously, the vessel, which was sixty percent at fault,

cannot complain about liability for sixty percent of the loss.

When the damages attributable to the fault of the stevedore exceed its compensation lien, a more difficult situation arises. Assume the following findings:

Vessel's fault	40%
Stevedore's fault	50%
Longshoreman's fault	10%
Damages	$10,000
Compensation lien	$4,000

The longshoreman recovers a judgment of $4,000 against the shipowner (forty percent of $10,000). Because the fault of the stevedore reduced the plaintiff's recovery $5,000 (fifty percent of $10,000), an amount in excess of the stevedore's compensation lien, no repayment of the lien is required. As above, the vessel cannot complain, for its liability is in proportion to its fault. The stevedore's liability is limited to $4,000, the amount of payments made by it pursuant to the compensation act. Whenever damages attributable to the stevedore's fault exceed the amount of its lien, the compensation act, as applied under the Equitable Credit, would actually reduce the stevedore's potential liability to a level beneath what it would have been were the stevedore a joint tortfeasor not protected by the Longshoremen's Act.[1] The injured longshoreman, however, now recovers only $8,000-$4,000 each from the shipowner and stevedore. At first blush, it appears that injustice has been done, for the longshoreman's recovery is now $1,000 less than it would have been in the absence of a compensation statute.[2] Upon reflection, though, this result is neither strange nor unfair.

[1] Admiralty now allows contribution from joint tortfeasors not statutorily immune in non-collision cases, with such contribution based upon comparative fault. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974).

[2] If no statute applied, the $9,000 recovery would be calculated in the normal manner. The longshoreman would receive full damages, but reduced by $1,000 because of his own 10% contributory fault.

Whenever a longshoreman is injured by the negligence of his employer and compensation payments to him fall short of what could have been recovered in action at law, the same result will follow. While the result might appear unjust in a given case, it spotlights the tradeoff which is the essence of the workmen's compensation scheme.[3]

In applying an Equitable Credit in this case, the following facts are relevant:

Total damages	$100,000
Edmonds' fault	10%
Stevedore fault	70%
Shipowner fault	20%
Compensation lien	$49,152.23

The lien consists of all payments made to or on behalf of Edmonds by Liberty Mutual through December 18, 1978.

Application of an equitable credit will result in Edmonds' receiving $20,000 from the vessel which he would keep. He will also keep all of the benefits paid by Liberty Mutual because the 70% fault of the employer deprived Edmonds of damages amounting to $70,000 (70% of $100,000). Inasmuch as the deprivation caused by employer negligence exceeded the lien, there would be no lien repayment so that Edmonds would initially realize $69,152.23, approximately $21,000.00 less than the verdict of $90,000. Edmonds, however, is continuing to receive benefits for temporary total disability at the

[3] The *en banc* opinion of the Fourth Circuit below amply demonstrated its understanding of this tradeoff.

> From the longshoreman's point of view, this is not a harsh result. He is protected by a system of compensation payable to him, regardless of fault, and in amounts much larger than were provided prior to 1972. He has a right of action against the ship for damages to the extent that negligence of the ship contributed to his injury.

577 F.2d at 1156, App. pp. A58-59. *See also Griffith v. Wheeling-Pittsburgh Steel Corp.*, 452 F. Supp. 841, 847 (W.D. Pa. 1978). For a discussion of the tradeoff and of other examples, see Coleman & Daly, *supra*, note 23, at 377-81.

rate of $184.07 per week. While *amici curiae* herein have no further information concerning the present status of the lien, the availability of future benefits will affect the ultimate application of any credit. This Court need not concern itself, however, with that issue. If the opinion of the Fourth Circuit below is affirmed, the district court will be ideally situated to consider in full the implications of future compensation benefits during the pendency of the interpleader action suggested by Judge Haynsworth, 577 F.2d at 1156, Petitioner's Appendix at A61.

ANALYSIS OF *SHELLMAN V. UNITED STATES LINES*, 1975 A.M.C. 362 (C.D. CALIF. 1974), *REV'D*, 528 F.2d 675 (9th CIR. 1975), UNDER THE EQUITABLE CREDIT

In *Shellman*, the jury found the following:

Total damages	$15,485.00
Shellman's fault	0%
Stevedore fault	70%
Vessel fault	30%

The compensation lien in *Shellman* was $9,977.41 (letter to counsel for *amici curiae* from defense counsel in *Shellman* dated March 30, 1976).

Application of the Equitable Credit would have resulted in the entry of judgment against the vessel owner in the sum of $4,645.50 (30% of $15,485.00). The negligence of the stevedore deprived Shellman of the balance of his damages, $10,839.50 (70% of $15,485.00). Since that sum exceeded the amount of the lien, however, Shellman would have been permitted to keep his compensation benefits of $9,977.41 and the stevedore, statutorily protected from any liability in excess of compensation, would not have been required to pay the difference. The end result for Shellman, however, would have been recovery of the sum of $14,622.91. While such a recovery is $862.09 less than the award he received as a result of the Ninth Circuit's decision, it would not necessarily be his total recovery under the Equitable

Credit. The compensation lien at the time of trial did not include an award for permanent disability (although a small advance for permanent disability had been voluntarily paid by the stevedore's compensation carrier). Moreover, there was evidence presented in the trial court that Shellman could never work again as a longshoreman. Assuming that, in the absence of any third-party liability, Shellman would have been entitled to some further compensation for his permanent disability, it follows that Shellman would similarly have been entitled to further compensation for his permanent disability under the Equitable Credit. This is because Shellman's employer, through the payment of compensation benefits, neither shouldered its proportionate share of his third-party recovery nor paid benefits up to the full limit of its statutory exposure.

If the benefits for permanent disability proved to be in excess of $862.09, Shellman would have been made completely whole. The application of the Equitable Credit would not have resulted in any diminution of his total recovery from all sources. If less than $862.09 was owed under the LHWCA for permanent disability, the shortage would simply result from the trade-off for guaranteed compensation on an adjusted and realistic scale irrespective of fault for the accident which produced his injury.

The actual *Shellman* result, however, can hardly be considered a just one. The principal beneficiary was the 70% wrongdoing stevedore. Although Shellman's ultimate recovery might have been as much as $862.09 less than the Court awarded him, it would have exceeded compensation benefits by $4,645.50; and the end result required the vessel owner to pay $10,839.50 (representing the stevedore's 70% portion of the $15,485.00 award) for someone else's wrongdoing. The primary wrongdoer went scot free.

A PROPOSAL FOR DETERMINING THE ULTIMATE COMPENSATION LIABILITY OF NEGLIGENT STEVEDORES UNDER THE EQUITABLE CREDIT.

The Equitable Credit, in keeping with Congress' policy determination, limits the exposure of stevedoring employers to the payment of statutory compensation benefits. The LHWCA calls for payment of temporary total compensation benefits while the worker cannot perform his duties and is under treatment. 33 U.S.C. § 908(b)(1970). Then, once the worker has returned to his job or a determination is made that he will never be able to return, either permanent partial disability, 33 U.S.C. § 908(c)(1970), or permanent total disability, 33 U.S.C. § 908(a)(1970), becomes payable, depending on the case. Frequently, only temporary benefits are paid prior to resolution of the worker's third-party action against a shipowner. Such was the case in *Frasca* where a permanent award of $9,571.02 was made *after* the third-party action, increasing compensation ultimately due to $15,009.32. Thus, while it is true that the compensation lien was only $5,438.30 at the time of trial, that figure did not represent the stevedore's full potential compensation liability under the LHWCA.

Mechanically allowing a negligent stevedore to limit its compensation payments under the Equitable Credit to those paid previous to resolution of the third-party action, without reference to the nature of those payments, would cause incongruous results from one case to another. Obviously, the amount of Frasca's total recovery should not depend upon the order in which the proceedings occur. There is no doubt that if Frasca had obtained his award for permanent disability *before* the trial of his third-party action, the entire $15,009.32 lien would have been considered as if it had all been paid, although in practice the compensation benefits for permanent disability would be paid by the stevedore's compensation carrier on a weekly basis over a period of

months. Since the compensation ultimately due, $15,009.32, exceeded the amount by which his employer's negligence reduced his recovery ($10,500.00), Frasca would be required by the Equitable Credit to repay the final $4,509.32 ($15,009.32-$10,500.00). Since that money had not yet been paid, however, the practical result would simply be to allow the stevedore's compensation carrier to stop compensation payments once the benefits paid equaled $10,500.00, since beyond that amount Frasca would be required to reimburse the carrier from his third-party recovery.

The rule that flows from this analysis, although appearing complicated, is actually very simple. A stevedore (or its compensation carrier) must pay compensation benefits equal to its full statutory liability, or to its proportionate share of the injured employee's third-party recovery, whichever is lesser. This rule simply reflects the fact that, once a stevedore has advanced compensation equal to its proportionate fault, it is entitled to a credit for the full amount of damages paid by the third-party shipowner before any further compensation is due. Then, if further compensation is due beyond the amount of the third-party judgment, the stevedore will be liable for a deficiency as before.

Thus, in *Frasca,* had the Equitable Credit not been rendered moot, the rule would have been applied as follows: The shipowner would have been required to pay its proportionate damages of $8,400.00. The stevedore would be required to pay compensation until a total of $10,500.00 (based on its proportionate fault) was advanced, since that amount was less than its full statutory exposure of $15,009.32. Since the $10,500.00 in compensation, when added to the third-party recovery of $8,400.00, exceeded that total compensation exposure, there would have been no deficiency and hence no further compensation paid beyond $10,500.00.

Law Offices

VANDEVENTER, BLACK, MEREDITH & MARTIN

August 14, 1974

Liberty Mutual Insurance Company
P. O. Box 12029
Suite 211, Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds v. Nacirema Operating Co., Inc. — D/A: March 3, 1974

Gentlemen:

A suit has been commenced in the United States District Court for the Eastern District of Virginia by Stanley Edmonds against the owners of the M/V ATLANTIC COGNAC for injuries allegedly sustained by Edmonds on March 3, 1974, by working as a longshoreman on the ATLANTIC COGNAC and while employed by Nacirema Operating Co., Inc.

We would very much appreciate your sending us copies of all medical reports pertaining to this longshoreman. We would also like to be advised of the amount of compensation and medical benefits paid to this longshoreman, the time lost from work as a result of this injury, his average weekly wage, and any information which you may have as to the facts and circumstances surrounding this accident.

We would very much appreciate your cooperation in connection with this matter.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN,
CHARLES F. TUCKER

CFT/led

Law Offices

VANDEVENTER, BLACK, MEREDITH & MARTIN

Mr. Glen O. Ulrici March 4, 1975
Liberty Mutual Insurance Co.
P. O. Box 12029
Suite 211
Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds — Nacirema Operating Co. — See: 535-73209 Reg. Date of Accident — March 3, 1974

Dear Mr. Ulrici:

As you know from our letter of August 14, 1974, and our telephone conversations the most recent of which was on February 4, 1975, we are representing Compagnie Generale Transatlantique, the owner of the M/V ATLANTIC COGNAC in defense of an action for damages brought by Stanley Edmonds as a result of injuries sustained on March 3, 1974, while employed by Nacirema Operating Co., Inc. and working on board the M/V ATLANTIC COGNAC. Enclosed herewith is a copy of the Complaint and the Answer filed thereto.

This case is presently set for trial on March 6, 1975. You are invited to take notice that the defendant expects to offer proof at trial that the negligence of Nacirema Operating Co., Inc. and/or its employees, including the plaintiff, was either the sole or a substantial concurring cause of the plaintiff's injuries, and that because of such negligence, there may be a reduction of the plaintiff's judgment, if any, by an appropriate percentage or amount, and that neither Nacirema Operating Co., Inc. nor Liberty Mutual Insurance Company as its insurer will be entitled to recovery of any lien for compensation or medical benefit.

You are invited to assume the defense of this litigation at this time for your account and pay any and all amounts that may become payable to the plaintiff or to participate in the defense of this litigation in any way that you see fit.

Should you need any further information with regard to this matter, we will be happy to supply the same.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN,
CHARLES F. TUCKER

CFT/bws
Encls.

LIBERTY MUTUAL

March 7, 1975

Charles F. Tucker, Atty.
One Commercial Place
Norfolk, Virginia 23510

RE: STANLEY EDMONDS — NACIREMA OPERATING CO. — C535-73209 REG D/A 3/3/74

Dear Mr. Tucker:

In reference to your letter of March 4, 1975 concerning the above captioned and the trial scheduled for March 6, 1975. We respectfully deny your invitation to take over the defense in this action and will not be represented at the trial.

Our lien should be on record with all parties.

Very truly yours,

GLEN O. ULRICI
Claims Supervisor

GU:NC

Law Offices
VANDEVENTER, BLACK, MEREDITH & MARTIN

July 28, 1977

Liberty Mutual Insurance Co.
P. O. Box 12029
Suite 200
11 Koger Executive Center
Norfolk, Virginia 23502

ATTENTION: Mr. Glen O. Ulrici

Re: Stanley Edmonds — Nacirema Operating Co.
C535-73209 REG

Gentlemen:

As you undoubtedly are aware, the above longshoreman, Stanley Edmonds, some time ago filed a third party claim against Compagnie Generale Transatlantique, the owners of the SS ATLANTIC COGNAC for damages allegedly resulting from an injury sustained by him on March 3, 1974 while employed by Nacirema Operating Co. and working on board the ATLANTIC COGNAC.

This case was first tried in the United States District Court for the Eastern District of Virginia in March of 1975 and a jury verdict at that time was later set aside by the judge. The case was again tried in December, 1975 and a judgment was granted in favor of the longshoreman. Upon appeal, however, to the United States Court of Appeals for the Fourth Circuit, the decision was remanded to the District Court with directions that the Court reduce the judgment by the proportionate fault attributable to the stevedoring company, Nacirema Operating Company. The Court of Appeals in effect, found that the defendant shipowner was only responsible for that portion of the damages caused by its own negligence and in addition was required to repay to the compensation carrier for the stevedoring company its lien.

A petition for rehearing was filed as a result of the decision of the Court of Appeals and this petition has been granted. It now appears that the case will be reheard before the Court of Appeals in October. In view of the fact that Liberty Mutual Insurance Company as compensation carrier for Nacirema Operating Company has an obvious interest in the outcome of this litigation, the purpose of this letter is to invite you to file an amicus brief with the Court on behalf of Liberty Mutual Insurance Company in order that all interested parties may be before the Court at the time of the rehearing.

I will be glad to furnish you with further information with regard to the rehearing should the same be required.

Very truly yours,

CHARLES F. TUCKER
Of Counsel for Compagnie
Generale Transatlantique

CFT/kb

Law Offices
VANDEVENTER, BLACK, MEREDITH & MARTIN
September 22, 1975

Mr. Glen O. Ulrici
Claims Supervisor
Liberty Mutual Insurance Company
P. O. Box 12029
Suite 200 11 Koger Executive Center
Norfolk, Virginia 23502

Re: Stanley Edmonds — Nacirema Operating Co.
C535-73209 — D/A 3-3-74

Dear Glen:

In accordance with our telephone conversation of this morning, I am enclosing herewith a copy of the decision rendered by Judge Kellam in this case setting aside the jury verdict and ordering a new trial. The new trial is scheduled for December 16, 1975.

Also in accordance with our telephone conversation, I would appreciate your sending me the latest medical reports which you have concerning this man and also advising me of the amount of the compensation lien to date.

Thank you very much for your cooperation.

Very truly yours,

VANDEVENTER, BLACK, MEREDITH & MARTIN

CHARLES F. TUCKER

CFT/kb
Enc.